No. 92-1450

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WATERS, KATHLEEN DAVIS, STEPHEN HOPPER, and McDONOUGH DISTRICT HOSPITAL, an Illinois Municipal Corporation,

Petitioners,

v.

CHERYL R. CHURCHILL and THOMAS KOCH, M.D.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

After all that has been said and done here, this much seems clear:

1. There is no genuine issue of material fact regarding the content of respondent Cheryl Churchill's ("Churchill") conversation with fellow nurse Melanie Perkins-Graham ("Graham") on January 16, 1987. Solely for purposes of their motion for summary judgment, defendants did not dispute Churchill's account of this conversation.

2. During a portion of the conversation, Churchill says she criticized aspects of the Hospital's program of cross-training nurses, potentially a subject of public concern. But Churchill admits that during this same conversation, she also discussed her supervisor Cynthia Waters's ("Waters") relationship with her, Waters's attributes as a supervisor and recent evaluation of her, and Churchill's negative opinion of nursing vice president Kathleen Davis ("Davis") – personal concerns, not concerns of the public, and thus unprotected under *Connick v. Myers*, 461 U.S. 138 (1983).

3. Defendants received reports of *this unprotected portion of the conversation* from nurse Mary Lou Ballew ("Ballew") and from Graham herself. Churchill does not dispute defendants' accounts of what was reported to them. There is no evidence from which any reasonable jury could conclude that these reports somehow put defendants on notice of Churchill's allegedly protected statements about cross-training.

4. Under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), Churchill must show that her protected speech was a "motivating factor" in defendants' decision to terminate her.

5. Defendants could not have been motivated by what Churchill actually *said* to Graham because they were not present at the conversation.

6. Defendants could only be motivated by what was reported to them.

7. The speech reported to Defendants was the type of speech found unprotected in *Connick*. Accordingly, defendants could not have had an impermissible motive when they decided to terminate Churchill based on the reports.

Churchill claims defendants still can be held liable for retaliatory discharge because they had "no reason to disbelieve" that the reported comments referred to cross-training. The factual predicate for Churchill's position finds no support in the record, and the unworkable rule of decision she suggests finds no support in this Court's First Amendment cases.

ARGUMENT

I.

DEFENDANTS DID NOT VIOLATE THE CONSTITUTION WHEN THEY TERMINATED CHURCHILL BASED ON BELIEVABLE, SUBSTANTIATED REPORTS OF UNPROTECTED, INSUBORDINATE SPEECH.

A. Churchill's Retaliatory Discharge Claim Fails Because There Is No Evidence That Any Protected Speech Was a "Motivating" Factor in Her Termination.

1. What Matters Under *Mt. Healthy* Is What Defendants Believed, Not What Churchill Says They Had "No Reason to Disbelieve."

Under *Mt. Healthy*, the plaintiff in a First Amendment retaliatory discharge case must show that constitutionally

protected conduct was "a 'motivating factor' in the [employer's] decision" to terminate her. 429 U.S. at 287. Churchill says she satisfied this requirement "by having shown she was fired for having engaged in speech which, *as far as Petitioners understood*, was on cross-training." (Resp. Br. at 23) (emphasis added).

Defendants "understood" no such thing, and Churchill cites not one line of testimony that supports this assertion. Instead, she relies on the individual defendants' refusal to speculate at their depositions, months or years after Churchill's termination, as to what Churchill might have said *besides* what was reported or what motivated her to express her dissatisfaction. Churchill attempts to convert defendants' statements as to what they did not know into concessions that the statements reported by Ballew and Graham could have referred to criticism of the cross-training program. That is not what defendants said at their depositions. To the contrary, Waters testified:

> Q. Do you have any reason to disbelieve me if I told you that the substance of the conversation between Cheryl and Melanie concerned the merits of the cross-training program?
>
> A. *The only thing I can say is the only thing I'm aware of is what I have got documented, period.*

(R. 72: Waters Dep. 11/19/87, pp. 447-48) (emphasis added).

Waters documented what Graham reported, *i.e.*, that Churchill (1) "said unkind and inappropriate negative things about Cindy Waters"; (2) "had discussed her evaluation quite a bit"; (3) "stated that [Waters] had wanted to wipe the slate clean and have things get better but this wasn't possible"; (4) "stated that just in general things

were not good in OB and hospital administration was responsible"; and (5) "stated that [Davis] was ruining MDH [the Hospital]." (R. 72: Waters Dep. 11/19/87, Ex. 7; *see also* R. 72: Davis Dep. 8/28/87, pp. 286-92; Graham Dep. 9/15/87, p. 82).[1] None of this referred to cross-training, and none of it was protected under *Connick*.

Hopper and Davis also testified that all they knew or believed *at the time of Churchill's termination* (the only relevant time) was that she had said the things reported by Ballew and Graham. (R. 72: Davis Dep. 8/28/87, pp. 289-90; Hopper Dep. 1/8/88, p. 156). For example, Hopper testified:

> Q. . . . The language beginning in the last paragraph of page one of Ex. 8 [App. 75-76] [referring to cross-training]. Do you have any reason to believe that language does not refer to the conversation that she had had with the cross-trainee, Melanie Perkins-Graham?
>
> A. Yes, it doesn't say that.
>
> Q. It doesn't say that. Is there any other reason to believe that that language does not refer to what she was talking to the cross-trainee about?
>
> A. Yes.
>
> Q. What?
>
> A. The written report that I had from Kathy Davis regarding what Melanie Perkins Graham stated was said at that meeting.

(R. 72: Hopper Dep. 1/8/88, p. 156).

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[1] In Graham's deposition testimony, there is no mention of any discussion of cross-training. (R. 72: Graham Dep. 9/15/87; Graham Dep. 2/6/89; R. 76: Graham Dep. 9/15/87; Graham Dep. 2/6/89).

Churchill's counsel went on to ask Hopper if he understood – at the time of his deposition – "*why* [Churchill] was telling [Graham], if she did, that Kathy Davis was ruining the hospital?" (*Id.*, p. 159) (emphasis added). Hopper responded:

> A. *I don't know.*
>
> Q. Do you have any reason to disbelieve that it was in reference to the cross-trainee program . . . ?
>
> A. *I don't have any reason to believe it either.*
>
> Q. Do you have any reason to disbelieve it, yes or no?
>
> A. No.

(*Id.*, pp. 159-60) (emphasis added). Churchill never explains how this testimony satisfies her burden under *Mt. Healthy* to show that Hopper was motivated by her discussion of cross-training. To the contrary, it shows that Hopper did *not* know about Churchill's allegedly protected speech when he approved her termination.

What matters under *Mt. Healthy* is what defendants *believed*, not what Churchill says they had "no reason to disbelieve." Only what defendants believed could have motivated them, and the unrefuted evidence shows that they believed Churchill had engaged in negative, insubordinate comments about her supervisors, not informative discussion of the evils of cross-training.

2. Given Churchill's Behavior Over the Preceding Several Months, Defendants Had Every Reason *to* Believe That Churchill Was Engaging in Insubordinate Conduct.

Defendants had every reason *to* believe what they did because Ballew's and Graham's reports were consistent with a pattern of rude, insubordinate behavior in

which Churchill had been engaging for several months. This behavior was observed not only by Waters, but also by other nurses in the OB Department who reported it to Waters and Davis. (See Pet. Br. at 4-5). These nurses reported that Churchill was displaying "total disregard for authority" and disrespect for Waters – the same kind of behavior reported by Ballew and Graham. (*Id.*).

Churchill does not deny the behavior that led to her warning after the Code Pink incident. She submitted no response to this warning. Nor did she respond to her final evaluation, in which Waters described a continuing pattern of "negative behavior" that "promote[d] an unpleasant atmosphere and hinder[ed] constructive communication and cooperation."[2] (See Pet. Br. at 6-8). So when defendants received Ballew's and Graham's reports, they had every reason to believe that Churchill was continuing her negative behavior towards Waters and no reason to believe that Churchill was discussing cross-training.

3. *Connick v. Myers* Expressly Permits Termination Based on the Type of Speech Reported by Ballew and Graham.

Statements such as those Churchill reportedly made about Waters and Davis are unprotected under *Connick v. Myers*, 461 U.S. 138 (1983). The First Amendment protects public employee speech that seeks to inform others on issues of public concern. It does not protect exaggerated personal complaints about one's supervisors made to a

[2] Indeed, when Waters asked Churchill to come to her office on her last day of employment, Churchill said, "Oh Cindy not again." (R. 76: Notes of Cindy Waters 1/27/87).

co-worker because such complaints do not advance the purposes behind protection of public employee speech. They "*convey no information* at all other than the fact that a single employee is upset with the status quo." *Id.* at 148 (emphasis added).[3]

In the face of this case law to the contrary, and citing no authority in support, Churchill asserts that "62%" of the speech reported to defendants was protected.[4] She comes to this conclusion by culling from Davis's and Hopper's deposition transcripts some (but not all) of their recollections regarding Churchill's reported speech, and then asserting that five of eight statements "more

[3] Courts of appeals applying *Connick* consistently have held that an employee's negative comments about employer policies or supervisors' practices are unprotected when those comments are intended not to inform but to complain. *See, e.g., Phares v. Gustafsson*, 856 F.2d 1003, 1008 (7th Cir. 1988) (complaint about how medical records unit operated); *Zaky v. United States Veterans Admin.*, 793 F.2d 832, 839 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986) (complaints about internal hospital policies); *Ekanem v. Health & Hosp. Corp.*, 724 F.2d 563, 570-71 (7th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984) (complaint about reorganization of a department at the hospital); *see also Caine v. Hardy*, 943 F.2d 1406, 1416 (5th Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 1474 (1992); *Kurtz v. Vickrey*, 855 F.2d 723, 729 (11th Cir. 1988); *Koch v. Hutchinson*, 847 F.2d 1436, 1447 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984); *Nathanson v. United States*, 702 F.2d 162 (8th Cir.), *cert. denied*, 464 U.S. 939 (1983).

[4] This farfetched quasi-mathematical analysis mistakenly suggests that protected and unprotected speech in the same conversation can somehow be quantified with precision and cases decided on a "winner take all" basis. In such cases, *Mt. Healthy* provides the appropriate rule of decision: The plaintiff must show that her protected speech was a motivating factor in the termination.

clearly denote policy than personal criticisms." (Resp. Br. at 22). Churchill's view is contradicted by the words of the statements themselves and the holding in *Connick*. If statements do not inform on issues of public concern (and none of the reported statements tells anyone anything about what actually was happening at the Hospital), the statements are unprotected under *Connick*. All anyone hearing these statements would know was that Churchill was unhappy with her working environment and her supervisors, issues of concern only to Churchill, not the public.

4. The "Historical Background" Here Contains No Evidence of an Unconstitutional Motive.

Courts may look to the "historical background" of a decision to determine the decisionmakers' motivation. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977). Had Churchill produced some evidence that defendants were motivated by her allegedly protected speech, the historical background of the termination would have been a proper subject of inquiry at trial. But Churchill's contention that the "historical context" (as she calls it) *alone* provides sufficient evidence of a retaliatory motive here fails because (1) the historical context she alleges is unsupported by the record; and (2) the claim Churchill makes based on her purported historical context is not before this Court.

Churchill posits that "Dr. [Thomas] Koch's [("Koch")] and Churchill's role in the controversy surrounding the [cross-training] policy led Petitioners to maintain special files on both of them in an effort to gather information and take action against them on a pretext independent of

their speech." (Resp. Br. at 27). She comes to this conclusion by citing evidence that (1) Koch criticized cross-training; (2) Hopper maintained a file on Koch; and (3) Waters maintained a file on Churchill.[5] But Churchill cites no evidence of any causal link among these unrelated facts.

There was uncontroverted evidence below that Hopper's concerns about Koch had nothing to do with Koch's occasional criticism of cross-training and everything to do with reports of his repeated abusive behavior towards patients and staff.[6] (R. 92: Supp. Aff. of Koch, Ex. 27). In 1986, Koch was the subject of an informal conference held to discuss this behavior. At Koch's request, the Hospital compiled a list of sixteen recent complaints in which he was accused of abuse of patients and staff.[7] (*Id.*). For example, Koch was accused of telling a mother that she "killed her baby with smoking – that the baby was better off dead"; calling a patient a "slut, whore, etc."; referring to a patient as a "piece of shit" even though he was

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[5] Waters maintained files on *all* the employees she supervised. (R. 76: Waters Dep. 11/18/87, p. 126).

[6] In her brief, Churchill suggests that Hopper's discussions of Koch with the administrative head of OB and medical chief of staff had something to do with Koch's criticism of staffing policy. (Resp. Br. at 5-6). There is no record evidence to support this assertion. To the contrary, Hopper testified that he was concerned about Koch's inability to control his temper at the meeting on August 21, 1987. (R. 76: Hopper Dep. 7/12/88, pp. 24, 35). At the meeting, Koch was "yelling" and "pounding on the table." (*Id.*, p. 24). "His carotid vessels were standing out. His eyes were bulging." (*Id.*, p. 35).

[7] Koch had explanations for all these incidents, but he could not deny that the behavior in question was reported to Hopper.

standing in an area where he could be overheard by patients; and pushing, slapping, and physically abusing a patient's spouse, a staff member and a patient. (*Id.*).

No reasonable jury could find all this was made up to mask an attempt to punish Koch because of his criticism of cross-training – especially when there is *no* evidence that any of the Hospital's decisionmakers reacted negatively to *anyone's* criticism of cross-training.[8] To the contrary, the unrefuted evidence shows that Hospital administrators encouraged debate about cross-training, even holding meetings for the purpose of discussing this and other staff concerns, and responded to criticism by making changes.[9] (R. 76: Hopper Dep. 7/12/88, pp. 152, 156-58, 159-60; Davis Dep. 8/27/87, p. 55; Waters Dep. 11/18/87, pp. 184-89; Welty Dep. 4/6/89, p. 207).

As for Churchill's "role in the controversy," she had none. There is no evidence that Waters or any of her superiors ever perceived Churchill as a "vocal critic" of cross-training. (*See* Pet. Br. at 7). Apparently acknowledging this, Churchill says "it was Churchill's professional and personal friendship with Dr. Koch" that led to her termination. (Resp. Br. at 26). But any claim by Churchill

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[8] Indeed, nowhere in her brief does Churchill suggest even one reason why they would do so.

[9] Churchill concedes that the Hospital "tolerated criticism of cross-training." (Resp. Br. at 26). She asserts that one (and only one) person was "reprimanded" for criticizing cross-training, but the record contradicts her. Nurse Janet Sullivan testified that when she discussed her criticism of cross-training with Hopper and Davis, "I didn't feel like they were mean to me or anything. They were very polite and informal, you know, tried to be helpful. They tried to make me feel comfortable." (R. 76: Sullivan Dep. 10/12/88, p. 20. She also testified that they made "changes for the better" in response to her concerns. (*Id.*).

that she was terminated because of her association with Koch is not before this Court. At issue here is Churchill's claim in Count I of her Complaint that she was fired for her allegedly protected speech on January 16, 1987. (R. 146: Third Amended Complaint, Count I, ¶ 14). Her claim that she was fired because of her association with Koch was the subject of Count V, which was dismissed pursuant to Rule 12(b)(6), a dismissal affirmed by the court of appeals. (App. 10 n.6). This claim cannot be resurrected here.[10]

5. Retaliatory Intent – Not "Deliberate Indifference" – Is the Appropriate State-of-Mind Requirement.

Contrary to *Mt. Healthy's* holding, Churchill suggests that defendants can be held liable here even if they had no intent to retaliate against her because of her protected speech. She suggests that this Court ignore *Mt. Healthy* and borrow the "deliberate indifference" standard from cases involving (1) municipal liability for employees' constitutional violations and (2) cruel and unusual punishment under the Eighth Amendment. (Resp. Br. at 31-34).[11]

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[10] *See Day v. Moscow*, 955 F.2d 807, 811-12 (2d Cir.), *cert. denied*, 113 S. Ct. 71 (1992).

[11] Churchill says defendants were "deliberately indifferent" to her First Amendment rights because Davis chose not to interview Churchill before deciding to terminate her. Davis made this decision because she "felt like [she] had enough information" after Graham confirmed Ballew's account of Churchill's comments and gave additional details of the conversation. (R. 76: Davis Dep. 8/28/87, p. 321; Davis Dep. 6/6/89, pp. 110-11). Given the several reports of Churchill's earlier insubordination Davis had received from Waters and the other

Churchill first relies on *Canton v. Harris*, 489 U.S. 378 (1989). But *Canton* employed the "deliberate indifference" standard to determine whether a municipality will be held liable for constitutional wrongs committed by its employees. *Id.* at 388 n.8. It had nothing to do with whether a constitutional wrong was committed in the first place. *Id.; see also Ware v. Unified School Dist. No. 492*, 902 F.2d 815, 819 n.2 (10th Cir. 1990).

Churchill also attempts to borrow from *Estelle v. Gamble*, 429 U.S. 97 (1976). Under *Estelle* and similar cases, public officials may be held liable for cruel and unusual punishment under the Eighth Amendment when they deliberately choose a course of action which is indifferent to the medical needs of a prisoner. *Id.* at 104. Such cases involve a type of affirmative duty to the plaintiff not present here. Defendants did have a duty, by virtue of their offices, to remove from the Hospital any employee whose conduct, they reasonably believed, threatened the Hospital's mission. To the extent the First Amendment was implicated because speech was involved, *Connick* and *Mt. Healthy* provide the rules of decision. There is no need to borrow principles from cases involving quite different concerns.

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nurses, her conclusion was reasonable. She was under no constitutional obligation to investigate further. Hopper did ask Churchill for her version of the conversation during her grievance meeting with him. (R. 76: Churchill Dep. 3/2/89, p. 418; App. 75-77). This, combined with defendants' three interviews of Ballew and interview of Graham belie any assertion that defendants were "deliberately indifferent" to what Churchill said. More importantly, the information they gathered was sufficient to form a reasonable belief that Churchill had engaged in conduct for which *Connick* permitted her termination.

6. A Rule of Strict Liability Without Regard to Motive Cannot Be Reconciled with This Court's Approval of Limitations on Public Employee Speech.

Churchill's amici would hold public employers strictly liable – regardless of their motive – whenever a conversation including some protected speech leads in some way to an employee's discharge. For support, they rely on cases involving prior restraint or other direct impingements on the right of the citizenry to speak freely.[12] These cases do not apply here, where the speech in question had already taken place before the government acted, and where the right to speak must be balanced against the government's right to manage its workplace. "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).[13]

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[12] *See* Brief for the National Education Association, *et al.* ("NEA Br.") at 4-8.

[13] It is immaterial that Churchill claims to have engaged in protected speech "along with" the unprotected speech reported by Ballew and Graham. If the First Amendment permits punishment of particular speech, then the government may punish without fear that its action may have the effect of chilling protected speech. *Alexander v. United States*, 113 S. Ct. 2766, 2773-74 (1993). Under *Connick*, a public employee who engages in the type of speech reported by Ballew and Graham risks termination. She does not somehow insulate herself from punishment by discussing issues of public concern during the same shift. *See Mt. Healthy*, 429 U.S. at 285-86.

The notion that a public employer may be held strictly liable in a case such as this, regardless of its motive, cannot be reconciled with *Connick's* express approval of termination when the employer has a "reasonable belief" that its employee has engaged in conduct unprotected by the First Amendment. 461 U.S. at 154.[14] Churchill's amici suggest that an employer's reasonable belief should control only when it is "borne out by the facts," *i.e.*, when the trier of fact agrees with it. (NEA Br. at 10). Such a rule would substitute the judgment of judge or jury – made months or years after the fact – for that of the employer who must act on the spot. If an employer reasonably believes one employee's word over another's, that belief should not be subject to judicial second-guessing. When, as here, the employer has formed a reasonable belief that the speech in question is unprotected, the constitutional inquiry under *Mt. Healthy* and *Connick* ends – because there is no impermissible motive.

B. The Hospital's Interests in Maintaining Discipline and Eliminating Disharmony Outweighed Churchill's Interest in Making Critical Comments to Graham.

Churchill suggests that the *Pickering* balance should be decided in her favor because there is no evidence of

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[14] Once a constitutionally permissible motive for punishing speech is recognized, it cannot be said that motive is irrelevant. *See Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion). Nor can imposition of liability without an impermissible motive be squared with this Court's admonition that "we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.' " *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (quoting *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring)).

"actual disruption" in this case. (Resp. Br. at 42). That is simply not true. Churchill confuses disruption during her shift on January 16, 1987, with the more important interests *Connick* seeks to protect. *Connick* allows an employer to consider its "need to maintain discipline or harmony among co-workers" and "need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." (App. 16-17). *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570-73). Defendants believed Ballew's report that Churchill was deliberately attempting to dampen the enthusiasm of Graham.[15] Waters testified that Churchill's reported comments were "the straw that broke the camel's back."[16] (R. 72: Waters Dep. 11/19/87, p. 436). The Hospital was privileged to terminate Churchill rather than suffer the effects of disharmony between these two nurses.

C. Defendants Were Under No Constitutional Duty to Provide Churchill with a *Loudermill* Due Process Hearing.

Churchill here resurrects the "First Amendment due process" claim that was rejected in both courts below. In

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[15] Churchill concedes that if she had succeeded in dampening Graham's enthusiasm, "the *Pickering* factors on summary judgment might tip in favor of the Petitioners." (Resp. Br. at 43). But whether she was successful or not is irrelevant under *Connick*, which permits an employer to act *before* the employee's conduct has an adverse effect on the employer's operations. 461 U.S. at 151.

[16] This was especially true in light of Churchill's reported comment that a fresh start to their relationship "wasn't possible." (R. 72: Waters Dep. 11/19/87, Ex. 7; *see also* R. 72: Davis Dep. 8/28/87, p. 292; Graham Dep. 9/15/87, p. 82).

her brief, "Churchill agrees that if the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further." (Resp. Br. at 39). Nevertheless, she contends that before an employer may act on reports of speech such as those received here, it must provide an employee like Churchill (who had no property interest in continued employment)[17] a due process hearing that meets the requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Churchill's position finds no support in the Constitution or this Court's First Amendment cases, and it runs contrary to *Mt. Healthy* and *Connick*.[18]

Churchill relies exclusively on cases involving direct regulation of speech. This Court rejected an argument similar to Churchill's in *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Court held a due process hearing is not required "as a *prophylactic* against non-retention decisions improperly motivated by exercise of protected rights." *Id.* at 575 n.14 (emphasis in original).[19] When, as

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[17] *See* App. 70.

[18] If, as Churchill now contends, defendants somehow violated the First Amendment by failing to conduct a *Loudermill* hearing, the Hospital cannot be held liable because such a violation would have been contrary to, not mandated by, Hospital policy. As the district court correctly found in disposing of Churchill's due process claim, "the hospital's policy *requires* supervisors to provide [employees] notice and an opportunity to present their case and discuss their point of view." (App. 72) (emphasis added). In her brief, Churchill makes no argument to the contrary.

[19] The Court found inapposite the same authority cited by Churchill. *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); Monaghan, *First Amendment "Due Process"*, 83 Harvard L. Rev. 518 (1970)).

here, a public employee's conversation allegedly contains both protected and unprotected speech, only the unprotected portion of the speech is reported to the public employer, and the employer reasonably believes retention of the employee will impair governmental functions, there is no constitutional requirement for a hearing of any sort before the employer may act. *Connick*, 461 U.S. at 154.

II.

THE INDIVIDUAL DEFENDANTS ARE IMMUNE FROM LIABILITY BECAUSE THEY DID NOT VIOLATE CONSTITUTIONAL PRINCIPLES THAT WERE CLEARLY ESTABLISHED IN LIGHT OF THEIR REASONABLE BELIEF AT THE TIME THEY ACTED.

The individual defendants cannot be held liable here because they did not violate any "legal rules that were 'clearly established' at the time" they acted. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). Churchill's suggestion that her version of the law here was "clearly established" depends entirely on cases that have nothing to do with retaliatory discharge. (Resp. Br. at 44-46). No case, in 1987 or now, required that defendants do more than they did here before deciding to terminate Churchill.

The "objective legal reasonableness" of a public official's actions must be evaluated based on the information possessed by the public official at the time he or she acted. *Anderson*, 483 U.S. at 641. If the individual defendants "could have believed" that their actions were lawful, they cannot be held liable. *Id.*; *see also Hunter v.*

Bryant, 112 S. Ct. 534, 537 (1991) (per curiam). A reasonable official reading *Connick* and its Seventh Circuit progeny in 1987 could have believed (indeed, should have believed) that "unkind and inappropriate negative things about" a supervisor, discussions of an employee's evaluation, statements of irreconcilable differences with a supervisor, complaints about a bad working environment created by "administration," and statements that a hospital vice president is ruining the hospital were not protected under the First Amendment. No case instructed Hopper, Davis and Waters that they could not act based on reports of speech such as this until they provided Churchill with a *Loudermill* hearing. Accordingly, the individual defendants are immune from liability.

III.

THE HOSPITAL CANNOT BE HELD LIABLE BECAUSE THE CONSTITUTIONAL VIOLATION ALLEGED BY CHURCHILL WOULD HAVE BEEN CONTRARY TO, NOT MANDATED BY, HOSPITAL POLICY.

The only unconstitutional policy alleged by Churchill in her complaint did not exist. Churchill was not fired pursuant to a policy "requiring that all employees of the Hospital . . . who criticize Hospital policy, do so only by directing such criticism to supervisory personnel." (R. 146, pp. 6-7). The statements by Hopper and Magin upon which Churchill relies do not support the claimed policy.[20]

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[20] Hopper testified that Churchill's statements to Graham which were critical of her supervisors should have been made to those supervisors, not to a cross-trainee whom she should have been encouraging to work in the OB Department. (R. 72: Hopper Dep. 3/16/88, p. 63). Magin was responding to a hypothetical question about how she would respond to criticism of *her* by one of her subordinates, not "criticism of hospital policy." She said she "would prefer that [the employee] bring the matter directly to my attention. That's what we encourage employees to do is go to their supervisor." (R. 143: Magin Dep. 11/20/87, p. 71). There is nothing unconstitutional about telling employees they should not criticize their supervisors in front of co-workers. *See Connick*, 461 U.S. at 148-49; *Pickering*, 391 U.S. at 572 n.4.

Churchill says the Hospital is liable for Hopper's approval of the decision to terminate Churchill because his decision was "final." But the mere fact that Hopper was the final decisionmaker does not mean that his decision subjected the Hospital to liability. The policy "developed and maintained" by Hopper and approved by the Hospital's board of directors encouraged employees to speak freely about Hospital-related concerns.[21] Hopper's single alleged deviation from this policy cannot result in municipal liability. *See St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

[21] *See* Pet. Br. at 47-48.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in petitioners' opening brief, petitioners request that this Court reverse the judgment of the court of appeals.

Respectfully submitted,

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